

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**MOTION IN LIMINE TO PRECLUDE TESTIMONY AND EVIDENCE
CONCERNING WEBSITES**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to Sixth Amendment's Confrontation Clause and Federal Rules of Evidence 401-403, 801-805 and 901, respectfully requests that this Honorable Court preclude the introduction of testimony and evidence of websites that the government will seek to introduce at trial. As grounds in support, Mr. Fariz states:

I. Testimony and Evidence of Websites Should Not be Admitted Because Websites are Hearsay without an Exception, Are Unreliable, and Based on Authenticity

The government will seek to offer into evidence certain websites that the government contends are Palestinian Islamic Jihad ("PIJ") websites. These websites, however, constitute hearsay. In addition, these websites often contain hearsay within hearsay. Fed. R. Evid. 805. Accordingly, the government would have to establish that the hearsay contained within the websites also were admissible as non-hearsay or under an exception. The Court should exclude the websites as hearsay.

Mr. Fariz asks that the Court exclude the testimony and evidence concerning these websites, since the government cannot establish the authenticity, reliability, and ultimate

admissibility of these websites. *See, e.g., Wady v. Provident Life & Accident Ins. Co.*, 216 F. Supp. 2d 1060, 1064-65 (C.D. Cal. 2002) (sustaining objection to introduction of websites, where proponent could not establish authenticity since witness had “no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents”); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (affirming exclusion of websites where proponent could not establish authenticity, particularly that the group had posted the information on the website). As one court observed in the civil context:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. *Anyone can put anything on the Internet*. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Civ. P. 807.

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) (emphasis added) (rejecting use of Coast Guard website to establish ownership of vessel, and requiring the plaintiff to “hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges”). In the criminal context, Mr. Fariz rights under the Confrontation Clause and the

evidentiary rules demand that the rules be applied vigilantly. Accordingly, Mr. Fariz objects to the admission into evidence of hearsay statements contained in websites or any other statements under the hearsay rules and the Confrontation Clause.

II. Testimony and Evidence of Websites Should Not be Admitted Under Federal Rules of Evidence 401 and 403

The government should also be precluded from offering testimony and introducing websites into evidence, because the websites and their content are irrelevant, unfairly prejudicial, and will likely mislead or confuse the jury. Fed. R. Evid. 401, 402, and 403. Mr. Fariz anticipates that the government will seek to introduce the websites particularly to introduce claims of responsibility. The defense has already stipulated to fourteen of the attacks specifically alleged in the indictment and has offered to stipulate to the remaining three attacks specifically charged. This stipulation includes that the individual or individuals who perpetrated the attack were associated with the PIJ. Thus, the admission of claims of responsibility are irrelevant and cumulative in light of the defense's stipulation and offer to stipulate. Fed. R. Evid. 403; *cf.* Fed. R. Evid. 807 (providing residual exception to Rules 803 and 804 if the court determines, *inter alia*, that "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts").

III. Testimony and Evidence of Websites Should Not be Admitted Because of Rule 16 Violations

Based on a defense request for expert materials and the government's admission that it had not yet provided all Rule 16 expert materials, the Magistrate Judge ordered the government to produce such materials by April 16, 2005. (Doc. 960).¹ On April 18, 2005, the government informed the defense by letter that it had two experts in internet computer investigation, namely Special Agents Russ Hayes and Jill Brinckerhoff, who were being identified to the defense but would probably not testify as experts. While the government provided statements of qualifications for these agents and some background materials, the government did not provide, nor has the government since provided, a summary of their anticipated testimony. Fed. R. Crim. P. 16(a)(1)(G).

Late in the day on June 27, 2005, the defense learned that the government intends to call its internet experts on June 28, 2005. The defense had requested advance notice of these experts, particularly so that the defense could have its internet expert available to assist the defense in Court. Also on June 27, 2005, the government produced to the defense additional internet materials, including records received from Yahoo and lengthy materials that the government will seek to introduce as exhibits through its experts.

Based on the review that the defense has been able to undertake with the limited time it has had with these materials, it is apparent that the anticipated testimony's scope exceeds

¹ April 16 was a Saturday; accordingly, the government's deadline was effectively Monday, April 18, 2005.

what was previously disclosed and will require the opportunity for further defense review. For example, the government, based on the additional Yahoo records produced yesterday, is claiming that certain websites are linked to the same e-mail address. The government is also going to present testimony that some of the websites have almost identical HTML code. These types of technical evidence and argument are precisely the reason that the defense needs sufficient time, with the assistance of its expert, to examine these materials in advance of the testimony.

In order to ensure that Mr. Fariz is being provided the effective assistance of counsel and that his substantial rights are not being affected by these late disclosures, Mr. Fariz would respectfully request that this Court preclude such testimony or evidence, or alternately continue such testimony and presentation of evidence until after the Fourth of July break. Such a continuance will afford Mr. Fariz the opportunity to review the materials that the government has provided and consult with his expert.

IV. Conclusion

For the foregoing reasons, Mr. Fariz respectfully requests that this Court preclude the testimony and evidence of websites. Alternatively, Mr. Fariz requests that the Court continue the testimony and presentation of such evidence.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF and hand delivery, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Alexis L. Collins, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
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